

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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2 right?

3 A Yes, that's right.

4 Q And neither did Bamberger or neither did
5 anyone at Finley, Kumble, right?

6 A I don't know whether Bamberger spoke to any-
7 body before he spoke to me. I got my information from
8 Bamberger.

9 Q When the bombshell hit and Burak said they
10 would refuse to give that opinion, did you go into a
11 private conference with your clients, Risher, Kayne and
12 Muh?

13 A No. The first thing I did was go into the
14 main meeting room, which was our library, and tell
15 everyone assembled what had happened.

16 Q Then what happened?

17 A Then someone asked a question as to whether
18 or not anyone in the room had researched the issue, and
19 Mike and I said we had someone research the issue, and
20 we believed that the transfer could take place, and we
21 were asked to draft the opinion.

22 We raised the issue that we were representing the
23 corporation and there was a general consensus of the
24 attorneys assembled that for the limited purpose of this
25 letter, we could represent the partnership.

1
2 We went back to my room, and I think Mike Bamberger
3 came back with me, one of the secretaries, and maybe
4 one or two of the other attorneys, I don't remember;
5 and we dictated a draft and took the draft back to the
6 room and circulated the draft.

7 Q The question I was asking you is: did you
8 have a private discussion with Muh and Risher and Kayne --

9 MR. BIEHL: Oh, your Honor, that has been
10 answered.

11 THE COURT: It has not been entirely answered.

12 A Not at that time, not before I went into
13 the room.

14 Q When did you have the private disucssion
15 with Risher, Muh and Kayne?

16 A I don't know if all three were present, but
17 one or more of them I think came in right after I dictated
18 the first draft.

19 Q And you had a discussion with them; is that
20 correct?

21 A That's correct.

22 Q And you had a discussion with them about
23 what should be done about this situation; is that correct?

24 A We talked about the situation, yes.

25 Q Are you going to discuss here today the

1 substance of that or are you going to plead attorney/
2 client privilege?
3

4 MR. GRUTMAN: Objection, your Honor.

5 MR. SHAW: That is a plea taken by the
6 client, not the attorney, your Honor, and I resent the
7 insinuation.

8 THE COURT: I don't think there is any in-
9 sinuation.

10 MR. MANDEL: Privilege was raised on the
11 deposition --

12 THE COURT: And there is a valid basis for
13 asking that, if there was a privilege raised.

14 MR. SHAW: Who raised it?

15 MR. MANDEL: My question is: can I go into
16 this discussion --

17 MR. SHAW: I suggest he ask the question,
18 your Honor, and then somebody will object or not.

19 Q What was the substance of your discussion
20 with Risher and Muh or Kayne, whichever two of the three
21 of them you were sure were there?

22 MR. SHAW: No objection, your Honor.

23 MR. GRUTMAN: No objection.

24 MR. BIEHL: We have no objection on behalf
25 of Kayne or Muh, but we would like to have identified

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2 who was present at this conversation.

3 MR. ESTERMAN: No objection, your Honor.

4 THE COURT: You may answer.

5 Q Who was present at the conversation?

6 A I was in the room; Mike Bamberger was in
7 the room; I am certain Paul Risher was there and maybe
8 both Bob Muh and Fred Kayne, but I can't be positive
9 they were both there.

10 Q What was the substance of the conversation?

11 A The substance of the conversation was, "What's
12 heppening; what does this mean?". I tried to explain
13 to them what had just transpired in the library, that
14 we had a consensus as of that moment that we should draft
15 the letter on behalf of the partnership, act as counsel
16 for the partnership for a very limited purpose, that
17 there was no obligation on the part of those assembled
18 to accept that opinion letter, but that we would bring
19 back a draft and see if a resolution of the problem
20 could be had.

21 Q Was there a discussion of whether the deal
22 should be dropped?

23 A I think there was a question asked; if there
24 is no agreement on the opinion letter will the deal be
25 dropped; and I think I answered yes.

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2 Q Was there a discussion as to the consensus
3 if your opinion was wrong?

4 A Yes.

5 Q What was the substance of that discussion?

6 A That the partners would have a claim against
7 our law firm if the opinion was so erroneous that it
8 constituted malpractice.

9 Q Was there a discussion as to the liability
10 of your clients if your opinion was wrong?

11 A No.

12 Q Did you tell them that they could be guilty
13 of coercion if you were wrong?

14 MR. GRUTMAN: That's objected to, your Honor.
15 Coercion is only as to specific property.

16 THE COURT: Well, just whether he used the
17 words or not. Overruled.

18 A No, I did not use that word.

19 Q Did you tell them that your opinion was --
20 strike that. Did you tell them that you were sure of
21 your opinion?

22 A I don't I used the word "sure" either. I
23 think the opinion speaks for itself, Mr. Mandel.

24 Q I am talking about the conversation. Did
25 you tell your clients that you could very likely be wrong?

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2 A No. I may have said that I thought we were
3 right and that the Rosenman firm had, in my opinion,
4 reasons other than their failure to find a case that
5 they thought was entirely in point for refusing to give
6 an opinion.

7 Q Would you state that conversation, please?

8 THE WITNESS Which conversation?

9 Q Did you just say that you told your clients,
10 Risher and Muh, and Kayne -- if he was there -- that
11 you thought the Rosenman firm had ulterior reasons for
12 not giving the opinion, that is, reasons other than
13 their actual understanding of the law? Is that what you
14 just said?

15 A That's right.

16 Q What ulterior reasons did you ascribe to the
17 Rosenman firm?

18 A I reminded them of a meeting we had had with
19 the Newburgers and Max Freund, of the Rosenman firm, very
20 early in the fall, at which Max Freund gave his opinion
21 that nothing could be done to save Newburger, Loeb, that
22 the bankruptcy of the partnership was inevitable and the
23 bankruptcy of the individual partners was inevitable;
24 and he said, "My experience in the Ira Haupt situation
25 is such that I don't think anything you can do can save

1 the situation."

2
3 I thought they were just going down a line of
4 saying the deal could not be done; nothing would work;
5 and that was coloring their refusal to look at the
6 Kings County Supreme Court case.

7 Q And you told that to your clients?

8 A That's right.

9 Q Did you tell that to the rest of the assem-
10 blage?

11 A No.

12 Q Did you tell the other people who were
13 assembled that you thought the Rosenman firm had an
14 ulterior reason not to give the opinion?

15 A I did not.

16 Q Did you tell the other people who were
17 assembled that you had researched the question?

18 A I said someone in our firm had researched
19 it, yes.

20 Q Did you tell the other people assembled
21 that you could very likely be wrong?

22 A I don't think I used that language. There
23 were 17 lawyers in the room and each of them knew that
24 in every opinion letter there is a margin for error.

25 Q So you did not say anything at all about

1 that you might be wrong?

2 A I thought that would be patronizing to a
3 group of pretty bright attorneys.

4 Q Answering my question, you did not say --

5 A I told you that I did not.

6 Q Was there any discussion on the part of the
7 other people present about dropping the deal if there
8 were no opinion letter?
9

10 A I don't remember any discussion other than
11 my discussion that I just related to you.

12 Q You undertook to represent the partnership,
13 right?

14 A Correct.

15 Q Did you then have a private discussion with
16 the partners, to give them the same information that
17 you gave your other clients, Risher and Kayne and Muh?

18 A Well, each of the partners was represented
19 by their own counsel at that meeting and I did not meet
20 with them privately.

21 Q They were not represented -- the partnership
22 was not represented by any counsel but you in that
23 opinion letter; is that right?

24 A Yes, but each partner had an attorney there.

25 Q Did you discuss with the partnership any of

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the confidential material you discussed with Risher,
Kayne and Muh?

MR. SHAW: Objection, your Honor. There is
no proof of confidentiality.

THE COURT: Take the word "confidential" out.

Q All right, any of the material did you discuss?

A At that time, no.

Q You volunteered to give that opinion; did you
not?

MR. GRUTMAN: I object. That is a distortion
of the testimony which has been given half a dozen times.

THE COURT: Let's see what the witness says.
Overruled.

A The facts, as I remember them, is that one
of the attorneys asked whether anyone had researched the
problem and either Bamberger or I, or both of us, stated
that our firm had had someone look into it and we were
asked whether we were prepared to give an opinion.

If that is volunteering, that is volunteering; but
that is the way it happened.

Q Going to page 265 of the deposition, starting
at line 4, and going to page 266, line 2, I quote:

"Q At the closing of the transfer agreement,
the question arose, did it not, about whether Article 98

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2 of the New York Partnership Law required the consent of
3 all partners to authorize the transaction?

4 "A Right.

5 "Q And the Rosenman firm was unwilling as
6 attorney for the partnership to issue an opinion letter
7 that no such consent of all partners was required?

8 "A No, that wasn't what they were asked to give
9 an opinion on; they were asked to give an opinion that,
10 under all the circumstances and the partnership agree-
11 ment itself, that the transfer was valid.

12 "Q And they refused to give an opinion that the
13 transfer was valid?

14 "A Correct.

15 "Q And you in fact then volunteered to give
16 such an opinion?

17 "A Correct.

18 "Q And in fact you issued such an opinion?

19 "A Correct.

20 "Q And that opinion considered the impact of
21 Article 98?

22 "A Correct."

23 BY MR. MANDEL:

24 Q Did I ask those questions and did you give
25 those answers?

1

2

A Yes.

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Q In acting as special counsel for the partnership, did you give the partners any information or any advice or hold any discussion with them other than what you have put on the sheet of paper in the opinion letter?

7

8

A I don't remember any colloquy in the room. There may have been.

9

10

Q Did you advise any of the partners of the consequences if your opinion were to be wrong?

11

12

A Each of them was represented by their own counsel.

13

14

Q That is not an answer to my question.

A I did not. They had their own counsel.

15

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Q At that moment, Mr. Persky, you were representing the corporation, which was the buyer; you were representing as special counsel the partnership, which was the seller; and you were also acting as attorney for Mr. Aizala, who was putting up this so-called million dollars of back-carried stock; right?

21

22

23

A It wasn't so-called, it was --

Q You were acting as attorneys for all those interests?

24

25

A Correct.

Q And, in addition to that, your partner,

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2 Mr. Greene, had some kind of a side deal with Aixala;
3 and you had a kind of side deal with Aixala?

4 MR. SHAW: Objection, your Honor.

5 MR. GRUTMAN: Objection, your Honor.

6 MR. SHAW: He is referring to the fact that
7 there was a loan of monies out of a trust but it has
8 nothing to do with a side deal.

9 THE COURT: There was a collateral transaction;
10 can we call it that?

11 MR. GRUTMAN: Yes, Judge.

12 A Yes.

13 Q As an attorney you were aware of the ethical
14 prohibitions against conflicts of interest?

15 MR. GRUTMAN: Objection.

16 MR. ESTERMAN: Objection, your Honor. It is
17 not the rule at all.

18 MR. GRUTMAN: If there is disclosure and
19 consent, there is no conflict of interest.

20 MR. SHAW: I object to the question, your
21 Honor, which, without setting that forth, implies there
22 is a conflict of interest.

23 THE COURT: If you rephrase that to be that
24 he is aware that there are cannons of ethics governing
25 conflicts of interest, I assume his answer will be yes.

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MR. MANDEL: Yes.

THE COURT: Is that right?

THE WITNESS: Yes, your Honor.

Q And there was a conflict of interest in this case, was there not?

MR. ESTERMAN: Objection.

THE COURT: Overruled.

A Yes, I think there was a potential conflict of interest in this case.

Q And Jeanne Bleich and Mabel Donoghue were members of the partnership who disagreed with the position you were taking in your opinion letter, right?

A That's correct.

Q And you did not have their consent to your acting on behalf of the partnership in a conflict-of-interest situation?

MR. GRUTMAN: I object on that ethical consideration 5-18 of the Code of Professional Responsibilities, being tortured by these questions.

THE COURT: We are only establishing facts at this point and, Mr. Grutman, this is a matter for a general argument; is it not?

MR. GRUTMAN: Very well, your Honor.

THE COURT: Overruled. It is clear that he

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2 did not have consent of Bleich and Donoghue, this
3 particular evening , for anything?

4 THE WITNESS: Absolutely.

5 THE COURT: Next question.

6 Q You had also heard Mr. Mandel raise the
7 question of the propriety of securing a transfer agree-
8 ment where the signatures of general partners were in-
9 duced by special considerations given to them, namely,
10 forgiveness of debt; is that correct?

11 A That's correct.

12 Q Did you consider that question on the night
13 of February 11th, when you issued your opinion letter?

14 A Yes.

15 Q It was not mentioned in your opinion letter;
16 was it?

17 A I didn't think it was a consideration I had
18 to include in the opinion letter.

19 Q The general partners who signed on behalf
20 of the partnership were fiduciaries; were they not?

21 A Correct.

22 Q And some of those partners said they would
23 not sign unless they got a forgiveness of their debt?

24 A They said something more.

25 Q Nevermind the more, did they say the less?

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2 A Well, you have to give the whole statement
3 before I can answer yes.

4 THE COURT: I think we can get an answer
5 to counsel's question and if anybody wants to amplify
6 it later, that's another matter.

7 Did they say at least what Mr. Mandel is
8 asking you, that they wouldn't sign unless they got a
9 forgiveness --

10 THE WITNESS: That was half of their statement,
11 your Honor.

12 MR. GRUTMAN: Don't abandon the ship, sink it
13 and --

14 THE COURT: You may examine on redirect. Go
15 ahead.

16 Q Did you consider that those partners had
17 the fiduciary right to demand those considerations as a
18 condition of their signatures?

19 A Espoused by them, yes.

20 Q Do you mean "espoused"?

21 A Enumerated. I am not as good as you and
22 Mr. Grutman with words.

23 MR. MANDEL: Please don't evaluate me to
24 Mr. Grutman's --

25 THE COURT: Put a question, please.

1
2 Q What did these -- what is the rest of it?

3 A When the question arose of getting repayment
4 of deficit capital paid back into the new entity, it
5 appeared to everyone that the major asset to be brought
6 back in were tax refunds --

7 Q Excuse me --

8 MR. GRUTMAN: Let him finish, please.

9 MR. MANDEL: He said he was going to make
10 a statement.

11 MR. GRUTMAN: He is.

12 A When asked for the tax refunds, we were
13 advised that in order to get an assignment of the tax
14 refund, each of the married general partners had to get
15 their wives to sign, otherwise the assignment wouldn't
16 be valid because they had signed joint tax returns, and
17 the wives said to the husbands, "You fellows haven't
18 done a great job in business, we are not going to give
19 up every last dollar."

20 And it was in partial consideration of the consent
21 of the wives that these accommodations were arranged
22 between the partners themselves and the partnership.

23 Q The wives were not partners.

24 A That's correct. They had no obligation to
25 anyone.

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Q And the wives were not fiduciaries.

A That's correct.

Q And, with or without the tax assignments, the partners owed the money -- with or without the tax assignments, they still owed the money.

A But there was no transaction without the assignments.

Q So that in order to make the transaction good, you gave the forgiveness to the general partners who demanded it?

A I didn't give anything; the partnership gave it.

Q And you gave an opinion that it was legal. You testified on direct that you are an attorney in good standing, and I would like to ask you --

MR. SHAW: Objection. I know what it is going to be.

THE COURT: Approach the side bar, please.

(At the side bar)

THE COURT: What is the story?

MR. MANDEL: I think his disbarment proceedings are pending.

MR. SHAW: I believe they are pending, but that would be irrelevant.

(In open court)

MR. MANDEL: Your witness.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Persky, in your conversations with Mr. Mandel during this period of time, did you talk with him about what would have happened if he had his way and the partnership was liquidated?

A Yes.

Q What did you say to him about this?

A We stated that we believed that the capital of the general partners and the limited partners and a good portion of the subordinated lenders' capital would be wiped out in liquidation. Mr. Mandel disagreed vehemently.

Q Can you recall what figure you gave as the capital at the point that you we are talking about?

A No.

Q Did Mr. Mandel give you any reasons why he felt or disagreed with what you were saying?

A Yes. The same reason he stated in Court yesterday: his client knew the partnership better than anyone else and we were just dead wrong.

Q Can you recall if you had any conversation

1 with him with respect to the size of the sum of money
2 owed to the subordinated lenders at that point?
3

4 A We did discuss numbers, but I can not remember
5 the numbers.

6 Q Did Mr. Mandel give you at any point a figure
7 which he anticipated that either he or Bleich or Donoghue
8 would receive in the event of liquidation?

9 A The starting point for Mr. Gross's capital
10 was always in dispute and I think that his version was
11 in excess of 300,000, and 369 sticks in my mind, but
12 300,000 is in my notes we looked at yesterday, of what
13 Mr. Gross would get in liquidation.

14 Q Is that what he said was the size of his
15 capital account or what he would receive on liquidation?

16 A That was the starting point, what the size
17 of his capital account was.

18 Q Did you discuss with him the various offsets
19 that might exist against that capital account?

20 A Yes. This was how the Buckley claim got
21 into discussion and the other claims listed in the
22 Ned Frank letter.

23 Q Is there anything you can recall about this
24 conversation that was in any way unusual, where he was
25 saying that he was entitled to a sum of money and you

1
2 were indicating that there were offsets and your clients
3 were entitled to a sum of money?

4 A Unusual? He was a little more rigid than
5 some attorneys I have met in negotiations, but it was
6 an unusual position.

7 Q In discussing the Buckley churning claim,
8 can you recall how long you discussed this claim?

9 THE WITNESS: With Mr. Mandel?

10 MR. SHAW: Yes.

11 A Well, at the meeting at his office it was
12 mentioned in the course of discussion and at the meeting
13 at the Golenbock and Barell office after we prepared a
14 draft complaint it was discussed in a little more detail,
15 but the purpose of putting it in writing was that we
16 felt we were not making ourselves clear to Mr. Mandel.

17 Q Did Mr. Mandel indicate to you how
18 long he had been representing Mr. Gross as of this point?

19 A I don't think he said it, but we knew that
20 Mr. Gross had switched counsel, from Golenbock and Barell
21 to Mr. Mandel, sometime in either late November or early
22 December.

23 Q So you knew Mr. Mandel had been representing
24 Mr. Gross since late November, correct?

25 A That would be the earliest, I think, in

1 this contention. I don't know if he had ever done
2 other work for him.
3

4 Q These conversations were being held in
5 December of January, about a month or two after Mr. Mandel
6 had first come on to the scene?

7 A Correct.

8 Q What, if anything, did Mr. Mandel say about
9 the supposed lack of merit of the churning claim, or did
10 he just dismiss it out of hand?

11 A His basic posture at the beginning of the
12 first meeting was, "I don't want to talk about anything,
13 but if we are going to talk about it, it is what the
14 partnership owes my client. My client did nothing wrong;
15 the claims have no merit; they are baseless."

16 Q Did you ever engage in any conversation
17 with Mr. Mandel about the specific merits of the churning
18 claim during December of 1970 or January of 1971?

19 A Only to the extent of giving him that
20 written document. That was the most detail we got into.

21 Q The written document, which is in evidence,
22 I believe, contains the assertion that Mr. Buckley had
23 been dissuaded from selling out his position in Westec
24 because of certain information that he had received
25 from whomever was handling the account?

MR. MANDEL: I object. That is leading.

MR. SHAW: Withdrawn.

MR. MANDEL: It is also inaccurate.

Q Did you have any conversation with Mr. Mandel when you discussed the merits about any statements that might have been made to Mr. Buckley to induce him not to sell his Westec stock?

A I don't remember getting into that.

Q Did you have any conversation with Mr. Mandel about whether or not Mr. Jordon, at the time that he was recommending that Mr. Buckley buy and hold the stock, was shorting the stock and had a long position himself in the stock?

THE COURT: No, Mr. Shaw, do you have any expectation of any affirmative answers to any of these questions?

MR. SHAW: I would like to know how much they discussed it, your Honor.

THE COURT: Why don't you ask him that, since, apparently, you do not.

Mr. Persky, was there any discussion about the Westec situation as to Buckley, when he was with Gross and Company.

THE WITNESS: With Mr. Mandel?

1 THE COURT: Yes.

2 THE WITNESS: No, your Honor.

3 Q You were asked questions with respect to
4 your belief at that time, almost four years ago, about
5 the merits of this claim, and I believe that Mr. Mandel
6 asked you questions with respect to turning-over ratio,
7 and you referred to the fact that there were a number of
8 transactions in the account and you talked about prima
9 facie churning.
10

11 In addition to the number of transactions in the
12 account, was there any other basis that you had in
13 December of 1970 and January of 1971 that the Buckley
14 claim was in fact a valid, good, subsisting cause of
15 action?

16 A All of the facts recited by Webster, Sheffield
17 went into my thinking, including the dollar volume, as
18 well as the number of transactions in the account.

19 Q Mr. Mandel says that there are some situations
20 where claims are falsely asserted just to delay or just
21 a tactical advantage.

22 In your opinion, is that true of the firm of
23 Webster, Sheffield?

24 MR. MANDEL: I object to that.

25 THE COURT: Sustained.

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2 Q In reaching the conclusion that you did with
3 respect to the merits of the case, did you rely in part
4 upon the reputation of the law firm that was asserting
5 the claim?

6 A Yes.

7 Q And that law firm is Webster, Sheffield,
8 correct?

9 A Yes, sir.

10 Q Did you know Mr. Ryan?

11 A Not prior to meeting him on the Buckley claim.

12 Q Did you ever have any conversation during
13 this period with Mr. Mandel about the fairness of what
14 Mr. Mandel was urging occur?

15 A I don't know if I used the word "fairness"
16 but at the Golenbock and Barell meeting, the one where
17 we thought we had reached agreement, I and I think
18 Mr. Steefel and some of the other attorneys stated to
19 Mr. Mandel, "What you want for your client is cash
20 coming out now." That was his starting position, " -- be-
21 fore anyone else, in circumstances where the people who
22 have been involved in the situation feel that your client
23 is responsible for the present financial condition of
24 the firm and that isn't right."

25 I don't know if I used the words "fair" or "right"

1 but that was the substance of the conversation.

2 Q Did you indicate to Mr. Mandel at that point
3 or at any other point why it was wrong for him to insist
4 that he receive or that his clients receive whatever
5 they said they were entitled to at that particular point
6 of time?
7

8 A Well, there was no justification under the
9 partnership agreement for getting money at all at that
10 time.

11 Q The partnership agreement provided for a
12 delayed period of time before which the payment could be
13 made, once it was determined money was owing, correct?

14 MR. MANDEL: I object. That is leading
15 and calls for a statement about the partnership agree-
16 ment and it is without foundation because the question
17 is not what the partnership agreement provided then,
18 but what a person would have the right to ask for if
19 the whole deal were changed by a transfer agreement.

20 MR. SHAW: I withdraw the question.

21 Q Did you have any conversation with
22 Mr. Mandel with respect to your position regarding
23 whether or not the money should be paid to him, if
24 money was owed, immediately?

25 A I think the conversation was in the context

1 that none of the other on-going participants, the old
2 subordinated lenders, limited partners and general
3 partners would agree, at least in the early part of
4 negotiations, to money going out.
5

6 In fact, that was the Exchange's position for a
7 good part of that time.

8 Q What?

9 A That no money should go out of the firm, if
10 there was to be a reorganization.

11 Q Was this communicated to Mr. Mandel?

12 A I don't remember whether the Exchange changed
13 its position before or after he came in, but either to
14 Mr. Mandel or to Mr. Silverman.

15 Q Was there conversation with respect to the
16 amount that he or his clients may or may not have been
17 entitled to?

18 A Yes, but we had a number which was substanti-
19 ally different than Mr. Mandel's number.

20 Q Was it Mr. Mandel's position that he would
21 not listen to what you were saying with respect to any
22 subtraction or adjustments to that amount?

23 MR. MANDEL: I object to the leading questions.

24 THE COURT: Well, I take it --

25 MR. MANDEL: I withdraw that.

1 THE COURT: All right. You may answer.

2
3 A That was his starting point. He did come to
4 a position, finally, where he did negotiate to a point
5 where he said, "I will recommend this settlement to
6 my client.", and that was at the Golenbock and Barell
7 meeting and he did get up and leave the room and did
8 come back and say, "I talked to my client, Mr. Gross,
9 and he does not want to go along with the deal." But
10 he was flexible enough to come to that point.

11 Q What was Mr. Mandel's response, if any, to
12 your statement that there would be a liquidation or a
13 bankruptcy if the deal did not go forward?

14 A At the beginning --

15 MR. MANDEL: I object. It is leading and
16 without foundation.

17 MR. SHAW: I withdraw it.

18 Q Did you discuss with Mr. Mandel the fact
19 that there might be a bankruptcy or a liquidation or a
20 destruction, in one form or the other, of this business?

21 A At the meeting in Mr. Mandel's office that
22 was a topic of conversation.

23 Q Had that been discussed on more than one
24 occasion or just once?

25 THE WITNESS: With Mr. Mandel?

MR. SHAW: Yes.

A Well, the first time I remember discussing it with him was at his office.

Q And what was Mr. Mandel's response to your statement regarding the destruction of this business?

A His position was that his client would rather see a liquidation than have the transfer agreement taking place, unless he got cash out at the time of the transfer agreement.

Q Was there any conversation with respect to what effect a liquidation or a bankruptcy or a destruction of the business would be upon the various general partners, limited partners and subordinated lenders?

THE COURT: I sustain an objection on grounds that they only used the word "liquidation" at this meeting.

Q Was there any conversation between you and Mr. Mandel with respect to what effect liquidation would have on the general partners?

A Yes.

Q What was said?

A It was my position, and I think Mr. Risher expounded the same position, that the general partners would totally lose all their money, and Mr. Mandel

1 disagreed.

2
3 Q What was said about the effect of liquidation
4 on the limited partners?

5 A Mr. Risher and I were of the opinion that
6 the limited partners would lose all their capital, and
7 Mr. Mandel disagreed.

8 Q What was said about the effect of liquidation
9 upon the subordinated lenders?

10 A We said we felt the subordinated lenders
11 would forego part of their capital, if not all, and
12 Mr. Mandel disagreed.

13 Q Was there any conversation during this
14 early period between you and Mr. Mandel with respect to
15 whether a special relationship may have existed between
16 Mr. Gross and some of these subordinated lenders or
17 limited partners?

18 A There came a time when I believe I told
19 Mr. Mandel that I believed his client was Mrs. Donoghue
20 and Mrs. Bleich, and he denied that.

21 Q Was there ever any conversation with respect
22 to how it happened, excluding Bleich and Donoghue, that
23 some of the limited partners and subordinated lenders
24 had that status?

25 THE WITNESS: You mean how they got into the

1
2 firm?

3 MR. SHAW: Yes.

4 A Some of the limited partners and their
5 attorneys and subordinated lenders had stated at some
6 meetings that they had been induced by Mr. Gross to come
7 into the firm. I don't know that to be a fact, though.

8 MR. MANDEL: Your Honor, why is this relevant?

9 THE COURT: I don't see the relevance at all.

10 MR. SHAW: The position taken by Mr. Mandel
11 and Mr. Gross is that there would have been a taking-away
12 of the interest of limited partners and subordinated
13 lenders, some of whom Mr. Gross himself induced to become
14 subordinated lenders and limited partners.

15 THE COURT: We have no proof of that at this
16 point at all and Mr. Mandel disagreed with it at that
17 meeting. So you have no foundation for that, certainly,
18 chargeable to Mr. Gross on this record.

19 Sustained.

20 Q Did you ever decide to render an opinion
21 letter in this case that was phoney?

22 A No.

23 Q Did you ever tell Mr. Risher to any of the
24 other parties to this case that the opinion letter you
25 had wirtten was a sham?

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A No.

Q Did you ever agree with the people in this case to make a false opinion letter and to bring baseless claims against Mr. Gross?

A No.

Q Did you ever agree to do any of these things for the purpose of earning a legal fee for your firm and getting a good client?

A No.

Q Did you get a good client?

A Yes.

Q Did your firm earn a legal fee?

A Yes.

Q And as a result of the earning of the legal fee, did you have your income effected in some way?

A Not really.

Q Why is it that when the law suit was started against Mr. Gross by the assertion of the Buckley churning claim, your law firm did not also sue Mr. Gross on the other claims that were raised about a year or so later, such as the secret trading account, such as the censure by the New York Stock Exchange and the \$50,000 fine, such as the turning down of the Atlas lease, such as some of these other things? Why weren't they claimed

1 against him immediately?

2
3 A The litigation department was not prepared
4 with those claims, had not talked to the people involved
5 and not gathered the evidence they thought was necessary
6 to draft those claims.

7 MR. SHAW: No further questions, your Honor.

8 MR. GRUTMAN: Just a few questions, your
9 Honor, and I will do it on either side of the afternoon
10 recess.

11 THE COURT: Why don't you do it now?

12 MR. GRUTMAN: Yes, sir.

13 THE COURT: What do you call what you are
14 about to do; is this recross, redirect?

15 MR. GRUTMAN: Well, it is in the nature of
16 redirect and partially recross to the extent that it
17 will involve very limited selections from the deposition
18 to deal with certain issues raised out of the deposition
19 by Mr. Mandel and I will not be ten minutes at the re-
20 cross.

21 RECROSS EXAMINATION

22 BY MR. GRUTMAN:

23 Q Mr. Persky, I invite your attention to
24 portions of the deposition which was skirted by
25 Mr. Mandel in the passages that he read to you --

MR. MANDEL: I object.

Q Go to page 110 --

THE COURT: Did I hear a characterization of this?

MR. GRUTMAN: Portions skirted by Mr. Mandel.

THE COURT: I will strike the word "skirted,"
just portions not read by him.

Q Page 110, line 4 --

THE COURT: Mr. Mandel has a right to read
what he wishes to read and you have a right to supple-
ment it appropriately.

Q Pages 110 through 112, and I will ask
whether or not the following series of questions was
not asked by Mr. Mandel on the deposition; beginning on
line 4:

"Q Was there any discussion as to whether or
not the partnership would bring action against Gross and
Company on the assigned claim?

"A Yes.

"Q When did that discussion take place?

"A It started in December and continued all the
way through February of 1971.

"Q Who did those discussions take place with?

"A I think I discussed that possibility with
almost every individual concerned with the operation of

1 Newburger, Loeb and Company at that time, all the general
2 partners, certainly, probably all the counsel for limited
3 partners and all the counsel for subordinated lenders."
4

5 BY MR. GRUTMAN:

6 Q Do you remember those question and those
7 answers?

8 A Yes.

9 Q Do you remember the following questions:

10 "Q What was the nature of those discussions?

11 "A Well, there was a general concern by every-
12 one and their counsel with making peace with everyone
13 concerned. There was also someone who wanted more or
14 less or who felt that his situation was different from
15 everyone else. I think you can appreciate dealing with
16 17 lawyers and law firms, each with different clients,
17 is somewhat difficult and one of the individuals was
18 concerned with was Charlie Gross, who was a person upon
19 whom a great deal of responsibility was placed by the
20 subordinated lenders and other limited partners and
21 general partners in the then critical condition of the
22 partnership. He was made responsible or in their mind
23 he was a responsible person.

24 "Q Go on, please.

25 "A The substance of the discussion which I

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2 participated in was that we had -- I had as counsel
3 for the partnership -- a desire to see the transition
4 go smoothly and I was looking to rapprochement with
5 Gross which would leave him to be treated from the same
6 manner as any other general partner with good capital.

7 There was a great deal of feeling and response by
8 other individuals who said Mr. Gross was a responsible
9 party here and should not be treated the same. Although
10 they articulated this, I think there was an unspoken
11 understanding -- you get a feeling in negotiations --
12 that, if in fact he would go along and take the same type
13 of deal other general partners would be taking, that
14 we could consummate with him."

15 MR. MANDEL: Then there is colloquy and I
16 go on to your answer:

17 "A One of the factors in my thinking was that
18 we had assignment of the claim in December and were
19 about to get assignment, and in general had an assignment
20 of the claim.

21 Let me say, after we got the assignment, I
22 articulated the fact that, in negotiating with Charlie
23 Gross that the ownership of that claim by the partnership
24 would be of beneficial use in the negotiations and I
25 believe at some point someone urged that he immediately

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be sued and I think it was my opinion, which was followed at that point, that he not be, that we did not want to harden the position with him and we wanted to keep the lines of communication open and so on."

BY MR. GRUTMAN:

Q Do you remember making those answers to Mr. Mandel when he examined you on deposition earlier in this case?

A Yes.

Q Were those answers which you gave at that time truthful?

A Yes, sir.

Q Are they still truthful now?

A Yes, sir.

Q When you were dealing with these various elements, limited partners, general partners, subordinated lenders and the like, were you trying to foment litigation?

A No, sir.

Q Did you exercise your best efforts to resolve the insipid disputes?

A Yes.

Q In giving the opinion letter which you did, were you in any way, Mr. Persky, effected in your judgment by your hope for personal financial gain or benefit?

1 A No.

2 Q You were asked some questions about Mr. Fred
3 Kayne and a law suit which he began in California.

4 Do you remember that portion of your interrogation
5 by Mr. Mandel?

6 A Yes.

7 Q Did you have anything to do with that law
8 suit?

9 A No.

10 Q Did you represent Mr. Kayne in that law suit?

11 A No.

12 Q Did Finley, Kumble represent Mr. Kayne in
13 that law suit?

14 A No.

15 Q As a matter of fact, to your knowledge, did
16 the Finley, Kimble law firm ever submit a bill to
17 Fred Kayne for professional services rendered?

18 A Not in connection with any of these matters
19 we have been discussing.

20 Q Lastly, some questions were put to you by
21 Mr. Mandel concerning obtaining from the client various
22 answers which existed in the partnership or by the part-
23 nership against Mr. Gross.

24 Do you recollect those questions?
25

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2 A Yes.

3 MR. MANDEL: One second, please. I object
4 to "obtaining from the client."

5 Q There were questions about obtaining them
6 from Mr. Frank?

7 A Yes, sir.

8 Q And you made reference in answering questions
9 put to you by Mr. Mandel to a certain letter you received
10 from Mr. Frank.

11 Do you remember giving that answer a short while
12 ago in your cross-examination?

13 A Yes, sir.

14 Q I have shown you what is marked -- is that
15 Exhibit 51 for identification?

16 A 50.

17 Q Is that the letter you received from
18 Mr. Frank?

19 A Yes, sir.

20 Q What is the date of the letter?

21 A February 22, 1971.

22 Q And is that date a time subsequent to when
23 your law firm was instructed to commence the litigation
24 against Charles Gross, Gross and Company, Bleich and
25 Donoghue?

1 A Yes, sir.

2 MR. GRUTMAN: I offer that letter in evidence.

3 MR. MANDEL: I object to it. It is not
4 probative of anything.
5

6 THE COURT: You have seen it, Mr. Mandel?

7 MR. MANDEL: Yes.

8 MR. SHAW: It was marked during the session
9 several days ago, your Honor. I believe the foundation
10 was established by Mr. Mandel's questioning extensively
11 regarding that document, as well as statements made
12 which would allow the document to be received in evidence.

13 MR. GRUTMAN: As the proponent of the docu-
14 ment, I would like to state why I am offering the docu-
15 ment.

16 THE COURT: Ladies and gentlemen, we will
17 take our recess and I will hear the lawyers in your
18 absence.

19 (Jury leaves the courtroom)

20 THE COURT: Why do you want this in?

21 MR. GRUTMAN: I want it in to meet the
22 allegations and insinuations made by Mr. Mandel that
23 Mr. Persky fomented, instigated, stirred up and invented
24 a whole host of baseless claims and that these
25 either originated in his mind or that he was in some way

1 or other acting in a professionally, improper fashion.
2
3 I offer this letter to establish when it was that the
4 Finley, Kimble law firm received the information con-
5 cerning the improprieties of Mr. Gross and that the
6 knowledge we had came from a client, that these were
7 properly received, and that the inference can be drawn
8 that Mr. Persky did precisely as he told Mr. Mandel; he
9 sifted through the various claims presented to us in
10 proper fashion by our client and dealt with them in
11 good faith in a proper legal fashion.

12 If your Honor does not admit this document,
13 which I submit Mr. Mandel opened the door on by the
14 extensive questioning about it during his cross-examina-
15 tion, I think that we would be placed at a very serious
16 disadvantage to demonstrate to the jury how it was, why
17 it was that the various claims which are involved in
18 this case were asserted by Finley, Kimble, who, he even
19 bawdily suggested, acting in our capacity as attorneys
20 on behalf of clients.

21 MR. MANDEL: Your Honor, I don't have any
22 objection to the admissibility of the letter to show
23 the correspondence that Mr. Persky elicited from
24 Mr. Frank, so long as it is made clear that this document
25 is not proof of the truth of anything said therein.

1 MR. GRUTMAN: I agree with that.

2 MR. MANDEL: And I will waive objection
3 so long as that is made clear to the jury.

4 MR. GRUTMAN: Fair enough.

5 MR. MANDEL: Because our position is that
6 Persky four times asked Frank for something like this.

7 THE COURT: Let me ask you this: if I
8 allow this in on this basis that you have consented to,
9 are you going to ask questions about it?

10 MR. MANDEL: Yes, I may. I have the right
11 to do that.

12 THE COURT: You do, and I am not about to
13 get in here all of this little stuff that Mr. Persky
14 has already said he completely winnowed out, and you
15 have your record made that he got a lot of information;
16 you have your record made that there was a letter on a
17 certain date, a \$500 petty cash chit, \$1,600 in unpaid
18 insurance charges --

19 MR. GRUTMAN: I am not going to try that,
20 and I am not looking to broaden or delay; but I think
21 this is a very important document. I don't propose to
22 ask any questions about it.

23 THE COURT: I know you don't, but you are
24 offering it and Mr. Mandel is apparently going to consent
25

1 to it and then ask questions about it.

2
3 MR. GRUTMAN: I hardly think an astute lawyer
4 like Mr. Mandel is going to go into some of the minutia
5 here. The principal elements, which were all discussed
6 in direct and cross-examination, are here on the record
7 and it would astound me if Mr. Mandel asked about the
8 conversion of the New York Securities tickets or the
9 \$500 petty cash chit, or the unauthorized installation
10 of a telephone line in his house, the leasing of cars,
11 and the like.

12 I want this to establish what Finley,
13 Kumble asked in a proper, professional way..

14 THE COURT: I think your record is made at
15 this point, that Mr. Frank sent him such a letter on
16 February 22nd, 1971. That is in the record, that he
17 finally got a letter, and Mr. Persky said a great number
18 of the items Mr. Frank told him about were so minuscule
19 that he regarded them as having no value to him whatsoever.

20 MR. GRUTMAN: Your Honor, when the smoke
21 clears and --

22 MR. MANDEL: He is not authorized to speak
23 for me, your Honor. If this comes in I certainly in-
24 tend to show what junk is in it.

25 THE COURT: I am going to, in my discretion,

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2 sustain the objection to this. I think it opens up a
3 lot of doors that do not need opening in a case that is
4 already over large.

5 MR. SHAW: Can't your Honor close the doors
6 if they are opened up?

7 THE COURT: No. I don't think it fair for
8 a jury to see a letter in which all of this tiny, little
9 stuff is in here. Ned Frank may have been right or he
10 may have been wrong; but there are 22 items and I don't
11 want the jury to be speculating about did Newburger,
12 Loeb pay his garage bill; was there something having to
13 do with a \$500 petty cash chit; was there a Louie Bracker
14 affair --

15 MR. GRUTMAN: That is a caution, your Honor.

16 THE COURT: What is the Joe Searles affair?

17 MR. GRUTMAN: The sale of a seat on the
18 New York Stock Exchange --

19 THE COURT: What is the charging to
20 Newburger, Loeb of substantially personal expenses?

21 MR. SHAW: That is one of the bases of
22 Mr. Gross's centure --

23 THE COURT: Isn't the jury going to begin
24 to say, "What's all this?" and then Mr. Mandel has to
25 go into it.

RECROSS EXAMINATION

BY MR. BERKOWITZ:

Q During the negotiations with the Webster, Sheffield firm, were you aware of Mabel Bleich or Jeanne Donoghue being partners of Gross and Company?

A During the negotiations, no. I am not sure whether I knew about Mabel Bleich by the time of the closing. I never learned about Jeanne Donoghue until after February 11th.

Q Did Mr. Berkowitz ever pay any fees to you or to Finley, Kumble for representation in connection with the Newburger, Loeb transactions?

A No.

MR. BERKOWITZ: That's all.

RECROSS EXAMINATION

BY MR. MANDEL:

Q You testified on cross that the understanding was if the deal went through, the fee would be paid by the corporation?

A Correct.

Q And if the deal did not go through, you would not get a fee from the individuals you represented in trying to push this deal through for their corporation?

MR. SHAW: Objection to the words "push this

1 deal through."

2 Q Well, work this deal through. Is that correct?

3 A It was an implicit, not an explicit under-
4 standing.

5 Q But the individuals were, nevertheless,
6 your clients; is that correct, and you have so testified.

7 Q I suppose before the corporation was in
8 existence the only clients were individuals.

9 MR. MANDEL: That's all.

10 THE COURT: Thank you.

11 MR. SHAW: No further questions.

12 RE CROSS EXAMINATION

13 BY RM. BERKOWTIZ:

14 Q Was there ever an implicit understanding,
15 implicit or otherwise, that Mr. Berkowitz was being
16 represented by you and to be paying you --

17 A I did not understand Mr. Berkowitz to be
18 part of the group until after the corporation was formed
19 and in fact after the closing took place.

20 MR. BERKOWTIZ: Thank you.

21 (Witness excused)

22 THE COURT: Mr. Shaw?

23 MR. SHAW: Your Honor, I call Paul Fitzgerald,
24 of the New York Stock Exchange.
25

